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No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

HARRY PLUMMER,

Petitioner,

vs.

LEDERLE LABORATORIES, A Division of AMERICAN CYANAMID COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

1. In a product liability case involving the oral polio vaccine, where two juries answered special interrogatories and specifically found that the respondent drug manufacturer's warnings were inadequate and that this was a proximate cause of the petitioner's injuries, was the United States Court of Appeals for the Second Circuit correct in entering judgment, notwithstanding the verdict, in favor of the respondent, on the alleged ground that a "reasonable jury could not have found proximate cause" and thus in essence, deprived the petitioner of his constitutional Seventh Amendment right to a jury trial?

LIST OF PARTIES

The parties in the litigation in the United States Court of Appeals for the Second Circuit are all identified in the caption.

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No.

In The

Supreme Court of the United States

October Term, 1987

HARRY PLUMMER,

Petitioner,

vs.

LEDERLE LABORATORIES, A Division of AMERICAN CYANAMID COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Petitioner, Harry Plummer, respectfully prays that a writ of certiorari be issued to review the decision dated May 19, 1987 and the mandate and judgment dated July 16, 1987, of the United States Court of Appeals for the Second Circuit, which were entered in this case granted the respondent judgment n.o.v. and dismissed the petitioner's claim.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, the Honorable John E. Sprizzo, dated February 21, 1986 on the respondent's motion to set aside the first jury's verdict is reproduced in the Appendix and has not been reported officially or unofficially. The opinion and order of the United States District Court, Southern District of New York, the Honorable John E. Sprizzo, dated July 24, 1986, denying the respondent's application for a new trial or judgment n.o.v. following the second trial is printed in the Appendix and has not been reported officially or unofficially. The opinion of the United States Court of Appeals for the Second Circuit is printed in the Appendix and is officially reported at 819 F.2d 349 (2d Cir. 1987). The order of the United States Court of Appeals for the Second Circuit, denying the petitioner's motion for rehearing *en banc* is reproduced in the Appendix and has not been reported officially or unofficially.

STATEMENT OF JURISDICTION

The mandate of the United States Court of Appeals for the Second Circuit which is sought to be reviewed is dated July 16, 1987. The opinion of the United States Court of Appeals for the Second Circuit is dated May 19, 1987. The order denying the motion for a rehearing *en banc* is dated July 2, 1987. The jurisdiciton of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment provides in pertinent part:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried

by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

STATEMENT OF THE CASE

This petition is being brought by a 51 year old man who is now confined to a wheelchair because he contacted polio when he came into contact with his granddaughter who had recently been immunized with the defendant's oral polio vaccine (Orimune). For years the respondent claimed that its vaccine could not cause polio to persons who came into contact with someone who had been vaccinated with it. *See Givens v. Lederle,* 556 F.2d 1341, 1344 (5th Cir. 1977). The respondent now admits that contact polio is possible, in fact, claims that it was so well known that there was no need to warn of it.

The polio vaccine had been administered by a doctor in South Lake Tahoe, California, who in his testimony, claimed that he was aware of the risks of contact polio.* Petitioner brought the action claiming that this respondent, the manufacturer and distributor of the vaccine, had failed to adequately warn of the real risks of developing contact polio and had failed to warn of what precautions must be taken to avoid contact polio, which is totally avoidable if the proper precautions are taken.

Contact polio is polio which afflicts someone who has himself not been vaccinated and who comes into contact with someone who has been vaccinated with the live polio vaccine manufactured by the respondent. In order to avoid contact polio, an adult who

---

* This doctor is a defendant in an action brought in the State of California and of necessity had to claim that he was aware of those risks of contact polio which had been published in the Physician's Desk Reference (P.D.R.). If not, he would be admitting his own negligence. *See Paul v. Boschenstein,* 105 A.D.2d 248, 482 N.Y.S.2d 870 (2d Dept. 1984).

has not been vaccinated should avoid contact with an infant's spittle or stool for thirty days after the vaccination.

The case came on to be heard in the United States District Court for the Southern District of New York. A jury answered special interrogatories, specifically finding that the respondent's warnings were inadequate and that this was a proximate cause of the petitioners injuries and entered a general verdict in favor of the plaintiff for $3,200,000.

The District Court set aside the first jury's verdict on grounds not raised by the respondent, but raised *sua sponte* by the District Court, that in giving a supplemental charge to the jury, the court erred in failing to specifically recharge the jury that the petitioner might somehow be a cause of his coming down with polio.

The District Court specifically found that there was sufficient evidence for the jury to have ruled in favor of the petitioner and limited the retrial to the issue of causation.

At the second trial a second jury answered 7 special interrogatories and again found that the respondent's warnings were inadequate and that this was a cause of the petitioner's injuries. The respondent's motion to set aside the second verdict was denied and judgment entered for the petitioner.

The respondent then appealed from that judgment. The United States Court of Appeals for the Second Circuit made the astonishing finding that judgment notwithstanding the verdict should be entered for Lederle "because a reasonable jury could not have found proximate cause," 819 F.2d at 359, and then went on to direct the dismissal of the petitioner's complaint.

REASONS FOR GRANTING THE WRIT

The decision and order of the United States Court of Appeals for the Second Circuit should be reviewed by this Court because any reasonable reading of the record indicates that there was sufficient evidence for *two juries* to make their specific findings that the respondent's warnings were inadequate and that this was a proximate cause of the petitioner's harm.

What the Second Circuit did, in violation of the Seventh Amendment, was in fact legislation by judicial fiat and social engineering, under the guise of a judicial decision; it reexamined the jury's findings of fact, which were fully supported by the record, when they had no right to do so, under the Seventh Amendment.

The issue of products liability and the right to bring actions against manufacturers of vaccines is now before the courts on numerous occasions. *See e.g., Flood v. Wyeth Laboratories,* 228 Cal. Rptr. 700 (Ct. App. 2d Dist., August 8, 1986), and there are various bills in the United States Congress dealing with immunity for makers of vaccine, compensation for victims injured by vaccines, etc. *See* New York Times, Saturday Nov. 15, 1986, pg. 1. It is admittedly a hot topic upon which there are strong opinions on each side.

The issue before this Court is whether the United States Court of Appeals may, contrary to the Seventh Amendment and because of its own views on the propriety of bringing a product liability claim against a manufacturer of a polio vaccine, overrule the jury's findings of fact, which are clearly supported by the record, so as to dismiss a plaintiff's claim when the law and the Seventh Amendment require otherwise.

The issue before this Court is to make it clear that the United

States Courts of Appeal and District Courts do not have a right to reexamine or overrule the jury's findings of fact, so long as the findings are contained in and supported by the trial record and the jury's determination was reasonable.

Issues as to whether or not a negligence or product liability claim should be permitted against vaccine manufacturers should be determined by state legislatures and the United States Congress and not by the Court of Appeals, simply because a jury's findings, supported by the record, may not agree with the court's own views.

I.

ARTICLE SEVEN OF THE CONSTITUTION PROHIBITS THE COURT FROM REEXAMINING THE FINDINGS OF FACT MADE BY THE JURY WHICH ARE SUPPORTED BY THE RECORD.

In the case now before the Court, a review of the record makes it clear that the jury's findings were fully supported by the record. The respondent, in warning of the risks of getting contact polio, deliberately misstated the risk. The respondent, in reporting the risk, made it appear that the risk of getting contact polio was more than one per million. This was misleading in that the only people at risk were those adults who had not been vaccinated, and for those persons, the risk was far more substantial.

In the United States between 1969 and 1976, there were 34 cases of contact polio reported. This was far more than people getting polio from any other source.

This is not to say that the jury of necessity had to find in favor of the plaintiff, but once two juries found in favor of the plaintiff by answering special interrogatories finding that the

warnings were inadequate as had been carefully explained by petitioner's expert, Dr. Darryl Salk, there was no basis for the Court of Appeals to state that no reasonable jury could have so found.

If the record is reviewed in this case by this Court it will become clear that the only basis for the Court of Appeals decision was legislation by judicial fiat and that the record does not support the decision of the Second Circuit.

It has unfortunately become the custom that many courts have sought to impose the view of the judge or panel of judges so as to create a social structure acceptable to the court. That, however, is not the law and limits must be put upon the courts legislating by judicial fiat in violation of the United States Constitution and petitioner's Seventh Amendment rights.

The Constitution makes it clear in the Seventh Amendment that the findings of fact by a jury shall not be "reexamined in any court of the United States." This Court has made it clear time and again, as it stated in *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 802, 64 S. Ct. 610 (1944):

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." 321 U.S. at 35.

Similarly, in *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740 (1946), this Court stated:

> ". . . where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with

its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." 327 U.S. at 653.

There is no question that where there is no evidence supporting the jury's verdict, or that the verdict could not have been reached on any fair evaluation of the evidence, that the verdict may be set aside. *See* F.R.C.P. Rule 50(b).

However, as the Second Circuit stated in *Mattivi v. South African Marine Corporation, "Huguenot"*, 618 F.2d 163, 167 (2d Cir. 1980), Judgment n.o.v. should be granted only when:

"(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or

(2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." 618 F.2d at 168.

In the case now before the Court, the evidence clearly supports the specific interrogatories answered by two juries that: (a) the respondent's warnings were inadequate; and (b) that this was a proximate cause of the petitioner's harm.

For the Second Circuit to have set aside the jury's verdict by their reexamining the evidence and claiming that no reasonable jury could have so found, deprived the petitioner of his

constitutional Seventh Amendment right to a jury trial.

To say that a plaintiff is entitled to a jury trial is merely lip service if the court may later set aside the jury's findings if the court does not agree with the result reached by the jury, although the jury's result is reasonable, based upon the evidence.

We are not, in this case, asking this Court to review this serious personal injury matter on an individual basis. What is being asked is that this Court make it clear to the District Courts, the United States Courts of Appeal and the various state courts, that the Seventh Amendment is not to be avoided by granting a jury trial to a party and then having the court make that right meaningless by the court granting judgment n.o.v., if the court, for any reason, does not agree with the jury's findings.

This is a matter which is of importance to the public as distinguished from being simply an issue important to the parties to this litigaiton. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1922). The issue that is of importance to the public is that this Court must make it clear that the Seventh Amendment provides for a meaningful right to a jury trial and that if the jury's verdict is supported by the record, judgment n.o.v. may not be granted, no matter what may be the court's own views, or the court's opinion of what a preferable result would have been. The courts should not legislate by judicial fiat, reexamining the findings of a jury which is what occurred in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX A — ORDER OF THE SECOND CIRCUIT DENYING PLAINTIFF'S MOTION FOR REARGUMENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 86-7768, 86-7798

FILED JUL 2 1987

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of July one thousand nine hundred and eighty-seven.

HARRY PLUMMER,

Plaintiff-Appellee,
Cross-Appellant,

-v.-

LEDERLE LABORATORIES, Division of AMERICAN CYANAMID COMPANY,

Defendant-Appellant,
Cross-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellee, cross-appellant Harry Plummer,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

Appendix A

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such has requested that a vote be taken thereon.

S/Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX B—DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, REPORTED AT 819 F.2d 349 (2d CIR. 1987)

Harry PLUMMER,

Plaintiff-Appellee, Cross-Appellant,

v.

LEDERLE LABORATORIES, DIVISION OF AMERICAN CYANAMID COMPANY,

Defendant-Appellant, Cross-Appellee.

Nos. 692, 1366, Dockets
86-7768, 86-7798

United States Court of Appeals,
Second Circuit

Argued Jan. 14, 1987.

Decided May 19, 1987.

Products liability action was brought based on alleged failure of manufacturer of oral polio vaccine to warn of danger associated with taking vaccine. The United States District Court for the Southern District of New York, John E. Sprizzo, J., entered a judgment for plaintiff and defendant appealed. The Court of Appeals, Tenney, District Judge, sitting by designation, held that: (1) warnings given by manufacturer of oral polio vaccine were adequate as a matter of law, and (2) plaintiff failed to establish that inadequacy of warning of manufacturer of oral polio vaccine was proximate cause of his contracting polio.

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Vacated and remanded.

David Jaroslawicz, New York City (Alfred S. Julien, Stuart A. Schlesinger, Edward J. Sanocki, Jr., Julien & Schlesinger, New York City, on the brief), for plaintiff-appellee, cross-appellant.

J. Peter Coll, Jr., New York City (Charles W. Gerdts, III, Laurie J. Gentile, Donovan, Leisure, Newton & Irvine, New York City, on the brief), for defendant-appellant, cross-appellee.

Before PRATT and MINER, Circuit Judges, and TENNEY, District Judge.*

TENNEY, District Judge.

This is an appeal and cross appeal from a final judgment of the United States District Court for the Southern District of New York, Sprizzo, *Judge*, entered upon interrogatory answers following two jury trials. The first trial commenced on October 1, 1984, and at the conclusion thereof the jury answered special interrogatories and returned a general verdict for plaintiff Harry Plummer of $3.2 million. The district court reserved decision on the motion of defendant Lederle Laboratories ("Lederle") to set aside the verdict, and ordered a second trial limited to the issue of proximate causation. The second trial commenced on June 2, 1986, and at the conclusion thereof, the jury returned interrogatory answers in favor of Plummer. A final judgment awarding $3.2 million in damages to Plummer was entered on August 13, 1986.

---

* The Honorable Charles H. Tenney, Senior District Court Judge of the United States District Court for the Southern District of New York, sitting by designation.

Appendix B

Lederle appeals from the district court's final judgment as well as its rulings and orders denying Lederle's motions for summary judgment, judgment notwithstanding the verdict, or a new trial. Plummer cross-appeals from the district court's order directing a second trial on the issue of proximate causation and refusing to award him interest from the date of the first jury's verdict. We vacate the district court's judgment and remand for entry of judgment notwithstanding the verdict. The cross-appeal is rejected in all respects.

BACKGROUND

This products liability action involves Orimune, a polio vaccine manufactured by Lederle. All agree that the development of vaccines against poliomyelitis has been a major achievement of modern preventive medicine. Ironically, the very success of the polio vaccines underlies the charge of negligence in this action.

At the outset, it should be noted that there are two different types of polio vaccine. Oral polio vaccine, technically referred to as poliovirus vaccine, live, oral, trivalent ("OPV"), developed by Dr. Albert Sabin, contains three live but weakened strains of virus that nonetheless provoke the vaccinee's immune system to respond and develop antibodies effective against the wild strain of the virus. Injected polio virus ("IPV"), developed by Dr. Jonas Salk, contains killed, or inactivated strains of virus. The Salk IPV vaccine was developed first and the Sabin OPV vaccine became available shortly thereafter. Orimune is the trade name for the OPV vaccine manufactured by Lederle. Both vaccines aided in greatly reducing the incidence of polio in the United States.

Notwithstanding certain inherent risks, OPV became the vaccine of choice in the United States and most of the world for a number of reasons. First, because OPV is administered orally,

commonly on a sugar cube, it is far easier to distribute than IPV which must be injected with a hypodermic needle. Second, the interaction of the live virus in OPV with the immunological system confers lifetime immunity. IPV, in contrast, requires periodic readministration in the form of "booster shots" to maintain immunity. Third, the oral administration of OPV stimulates production of antibodies in the gastrointestinal tract as well as in the bloodstream, thus producing bowel immunity which interrupts the method of transmitting the wild strain of the virus. Over time, the interruption of the virus' transmission path is expected to eradicate the wild strain. Finally, persons vaccinated with OPV shed vaccine viruses through feces and saliva to nonvaccinated persons, thereby conferring immunity on them as well.

To understand the risks inherent in OPV, it is necessary to comprehend the immunization process. The live but weakened viruses of OPV grow in the intestinal tract of the vaccinee. The growing viruses trigger the vaccinee's immune system to produce antibodies which render the vaccinee immune to the disease after 30 days. Rarely, but at a statistically predicable rate, the virus reproduced in the vaccinee's intestinal tract reverts to the virulent form. When this occurs, the vaccinee or persons coming in close contact with the vaccinee during the 30-day period may contract polio. Unvaccinated adults can take two precautions to avoid the risk of "contact polio": (i) alternative vaccination with IPV prior to contact with the vaccinee; and (ii) avoidance of contact with the vaccinee for one month, during which time live polio viruses are being shed from the intestional tract of the vaccinee via the saliva and feces.

In November 1979, Orimune was prescribed and administered to Plummer's infant granddaughter, Mavis Lyster, by Dr. Abby Cohen. Dr. Cohen did not convey any warnings to Mavis' mother.

Plummer thereafter contracted a condition diagnosed as paralytic poliomyelitis. It is undisputed for the purposes of this appeal that Plummer had never been vaccinated and contracted polio through contact with his granddaughter.

In a deposition, Dr. Cohen stated that his education and training had informed him that there was a slight risk in administering OPV inasmuch as the vaccinee or those coming in contact with the vaccinee could potentially develop paralytic disease. His reading of professional journals confirmed that polio could be transmitted via "secretions from the mouth, but much more commonly by way of stool." Joint Appendix ("JA") 184. He described the risk of contact polio as "small," admitting that he "probably did not know [the statistics on its occurrence]." He also indicated he was aware that both the 1977 package insert for Orimune and articles in professional journals recommended that doctors warn patients concerning the risks of OPV. However, he expressed his view concerning the necessity of conveying warnings as follows:

> My feeling . . . was that there is an extremely minute percentage of people who will have the complications from the drug. I felt that, again, because I had never experienced [other practicing physicians] giving these warnings, it . . . wasn't necessary for me to do it; and . . . I felt . . . that giving the warning . . . could scare off parents from bringing children in for future vaccinations, which to me were much more important than the warning itself for the few number of people who are going to contract disease. . . .

JA 182-83.

Appendix B

The Warnings at Issue

Under established law, the sellers of dangerous products may be required to include on containers of these products directions or warnings as to their use. Restatement (Second) of Torts, § 402A comment j (1965). It is undisputed that certain types of drugs, such as polio vaccines, are dangerous. *Id.*, comment k. Therefore, in assessing the potential liability of prescription drug manufacturers, it is essential to review the informational inserts provided with the drugs.

The Orimune package insert describes in detail the risks of administering OPV. The "Adverse Reactions" section of the June 1979 package insert, the principal warning at issue here, states in pertinent part:

> Paralytic disease following the ingestion of live poliovirus vaccines has been, on rare occasion, reported in individuals receiving the vaccine, as well as in persons who were in close contact with vaccinees. Most reports of paralytic disease following ingestion of the vaccine or contact with a recent vaccinee are based on epidemiological analysis and temporal association between vaccination or contact and the onset of symptoms. Most authorities believe that a causal relationship exists.
>
> The Center for Disease Control reports [the number of doses distributed for certain years and the number of occurences of contact polio and vaccine-associated polio]. . . .

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> The risk is estimated to be one case in a recipient for every 20 million doses of vaccine distributed and one case in a contact for every 6 million doses distributed.
>
> The risk of vaccine-associated paralysis is extremely small for vaccinees, susceptible family members and other close personal contacts. However, the responsible physician should convey or specifically direct personnel acting under his authority to convey the warnings to the vaccinee [or] parent . . . of the possibility of vaccine-associated paralysis prior to administration of the vaccine. When the attenuated vaccine strains are to be introduced into a household with adults who have never been vaccinated, some physicians may choose to give these adults at least two doses of IPV a month apart . . . before the children receive ORIMUNE. The benefit of being protected against polio is believed to greatly outweigh any risk from polio vaccine.

Thus, the 1979 package insert advises that unvaccinated individuals may avoid the risk of contracting contact polio from Orimune vaccinees by receiving an IPV vaccination prior to contact.

The 1977 Orimune package insert[1] was also introduced into

---

1. The "Adverse Reactions" section of the 1977 insert states in pertinent part:

> Expert opinion is in agreement that the administration

(Cont'd)

evidence and it varies from the 1979 insert by stating that "expert opinion is in agreement that the administration of [OPV] is generally an effective and safe method of protecting populations against the natural disease", and that "[t]he estimated risk of vaccine-induced paralytic disease occurring in vaccinees or those in close contact with vaccinees is extremely low." It did not give a breakdown of the estimated number of cases of contact polio, as the 1979 warning did. Also, it did not advise physicians to consider administering IPV to previously unvaccinated individuals who might come in contact with the Orimune vaccinee, as a precaution against contact polio. Rather, it merely stated that

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(Cont'd)

> of live oral poliovirus vaccines is generally an effective and safe method of protecting populations against the natural disease. Paralytic disease following the ingestion of live poliovirus vaccines has been reported in individuals receiving the vaccine, and in some instances, in persons who were in close contact with subjects who had been given live oral poliovirus vaccine. The rare occurrence of "vaccine related cases" were considered "compatible" with vaccine induced disease where certain epidemiological criteria including certain incubation, clinical and laboratory values could be judged compatible with vaccine as a cause. It has been estimated that the risk of vaccine induced paralytic poliomyelitis is about one chance per million doses.
>
> The estimated risk of vaccine-induced paralytic disease occurring in vaccines or those in close contact with vaccinees is extremely low. However, the "risk" should be considered by the physician and such information should be conveyed to the parent(s) at the time of vaccination. Those parents of a vaccinee who have not had previous polio vaccination should probably be considered among those adults as subject to increased risk of exposure and in this special situation, in the judgment of the physician responsible, protection may be needed for these intimate contacts.

Appendix B

"parents of a vaccinee who have not had previous polio vaccination should probably be considered among those adults as subject to increased risk of exposure and in this special situation, in the judgement of the physician responsible, protection may be needed for these intimate contacts."

Dr. Darrell Salk, son of the doctor who discovered IPV, testified as an expert witness for the plaintiff. He stated that in his opinion Lederle's warnings inaccurately estimated the number of occurrences of contact polio per doses distributed as one in 6 million, and misleading failed to compare the risk of contracting contact polio relative to the risk of contracting wild polio. However, he admitted that Lederle's method of stating the risk is also used by most medical authorities in the United States, including the United States Public Health Service Advisory Committee on Immunization Practice (JA 298, 304; 314-19) and Centers for Disease Control (JA 334-35), the Committee on Infectious Diseases of the American Academy of Pediatrics (JA 308), and an Institute of Medicine Study of Poliovirus vaccines (JA 334-38).

The Centers for Disease Control provided the data in the 1979 insert stating the risk of contact polio per doses distributed. JA 334-336; Brief for Appellant, at 39. The insert was approved by the Bureau of Biologics (presently the Office of Biologics Research and Review) of the Food and Drug Administration in June, 1979, as required by 21 C.F.R. §§ 600-601 (1986).

Procedural Rulings

Although Plummer's complaint originally alleged several theories of liability, the case did not proceed to trial on all of them. After the completion of discovery, Lederle moved for

summary judgment on the grounds that (i) its warnings were adequate as a matter of law and (ii) there was no proof that claimed inadequacies in the warnings proximately caused the injury because Dr. Cohen knew of the risks of contact polio but made a conscious decision not to convey any warning to the parents of the vaccinee. Plummer contended that the warnings were inadequate because they failed to recommend any precautions that could be taken to avoid the risk of contact polio, citing as examples (i) alternative administration of IPV to unvaccinated individuals prior to contact with the vaccinee, or (ii) avoiding contact with the vaccinee for one month.

The district court rendered an oral ruling denying Lederle's pre-trial motion for summary judgment but substantially narrowing the issues to be tried. In accordance with this ruling, the parties prepared a Joint Pre-Trial Order dated May 4, 1984 which reflected the district court's view that the only issues remaining to be tried, as a matter of law, were (i) whether Lederle had a duty adequately to advise the reasonable physician of precautions to be taken in connection with the prescription and administration of Orimune; (ii) whether Lederle satisfied such a duty; (iii) assuming that Lederle did not satisfy its duty, whether that failure was the proximate cause of plaintiff's damages.

The case proceeded to trial. The jury returned a verdict that Lederle was liable to Plummer for damages in the amount of $3.2 million, finding that the 1977 insert was inadequate because it did not include general precautions on either of the two specified precautions for avoiding the risk and the 1979 insert was inadequate because it did not include general precautions or the second specified precaution, although it was adequate in recommending the first specified precaution, alternative administration of IPV. The jury further found that Lederle had

used reasonable efforts in distributing the 1979 insert and that it had been received by Dr. Cohen. The jury concluded that Lederle's inadequate warnings were a proximate cause of plaintiff's injury and Dr. Cohen's failure to warn was not the sole cause of plaintiff's injury.[2]

---

2. The first jury was asked:

> 1. Do you find that the . . . [1977 insert] . . . failed to advise a reasonably prudent private physician that [an unimmunized adult should be given an IPV inoculation?]
>
> 2. Do you find that the . . . [1977 insert] . . . failed to advise that unimmunized adults should [avoid contact with OPV-vaccinated infant for one month]?
>
> 3. Do you find that the . . . [1977 insert] . . . failed to advise a reasonably prudent private physician of the necessary precautions to be taken to avoid contact with any individual immunized with [OPV]?
>
> 4. [Same as question (1), with respect to 1979 insert]
>
> 5. [Same as question (2), with respect to 1979 insert]
>
> 6. [Same as question (3), with respect to 1979 insert]
>
> 7. Do you find . . . that the 1979 insert . . . was disseminated in a reasonable manner to the medical profession prior to November 3, 1979?
>
> 8. Do you find . . . that Dr. Cohen received the 1979 insert . . . prior to November 3, 1979?
>
> 9. If the answer to any one of questions #1 through #6 is "Yes" do you find . . . that the inadequacy of defendant's warning was a proximate cause of the plaintiff's injury?

(Cont'd)

Appendix B

Lederle moved for judgment notwithstanding the verdict or a new trial, contending that its warnings were adequate as a matter of law and that the charge on proximate causation was erroneous. The district court ordered a new trial limited to the issue of proximate cause, reasoning that the jury might have been misled by an erroneous supplemental instruction which failed to point out that the defendant could be exonerated not only by the doctor's negligence but also by the patient's contributory negligence. The judge ruled over Lederle's objection that it would allow Plummer to introduce evidence at the second trial concerning his theory that the package inserts "minimized the risk" of contact polio.

The second jury answered seven questions. In response to questions 1 and 2, the jury agreed that the defendant's package insert minimized the risk of contact polio and that this minimization influenced Dr. Cohen to not give any warnings. The remaining five questions asked whether each inadequacy of the inserts (as found by the first jury) was a legal cause of plaintiff's injury. All of these questions were answered affirmatively except question 7, to which the jury responded that the 1979 insert's failure to advise of general precautions was not a legal cause of plaintiff's injury.[3] The clerk entered a judgment in favor of plaintiff.

(Cont'd)

> 10. Do you find . . . that the plaintiff's injury was caused solely by the independent decision of Dr. Cohen to administer [OPV] to the plaintiff's grandchild without informing the plaintiff's daughter of the risks incident thereto and the precautions to be taken in that regard?

All of the questions except numbers 4 and 10 were answered affirmatively. JA54-57.

3. The second jury was asked:

(Cont'd)

Appendix B

Lederle again moved for a new trial, on the ground that the second jury's answers to questions 6 and 7 were irreconcilably inconsistent. Lederle claimed that questions 6 and 7 were redundant, and therefore the jury could not simultaneously conclude: (i) that the 1979 insert was inadequate in failing to recommend as a specified precaution avoidance of contact with the vaccinee for one month (response to question 6) and (ii) that

---

(Cont'd)

> 1. Do you find . . . that the manner in which the defendant described the risk of vaccine associated contact polio in the package insert minimized that risk?
>
> 2. If [yes to the above], did that description influence Dr. Cohen to not give any warnings?
>
> 3. Do you find . . . that the defendant's failure to advise [physician in 1977 insert] that a program of IPV inoculation for unimmunized adults should be considered was a legal cause of the plaintiff's injury?
>
> 4. Do you find . . . that the defendant's failure [to advise physician in 1977 insert] that unimmunized adults should not come in contact with [OPV-vaccinated infant] for approximately one month was a legal cause of plaintiff's injury?
>
> 5. Do you find . . . that the defendant's failure [to advise physician in 1977 insert] of the necessary precautions to be taken to avoid contact with [OPV-vaccinated infant] was a legal cause of plaintiff's injury?
>
> 6. Same as question (4), with respect to 1979 insert.
>
> 7. Same as question (5), with respect to 1979 insert.

All of the questions except number 7 were answered affirmatively. JA 133-34.

the insert adequately recommended general precautions (response to question 7). Lederle's motion was denied in an order dated July 24, 1986.

DISCUSSION

A federal court sitting in diversity must follow the law directed by the Supreme Court of the state whose law is found to be applicable, and if there is no direct decision by the highest court of that state, the federal court should determine what it believes that state's highest court would find if the issues were before it. *See Meredith v. Winter Haven,* 320 U.S. 228, 234-37, 64 S.Ct. 7, 10-12, 88 L.Ed.9 (1943). Plaintiff is a California resident, his granddaughter was inoculated with Orimune in California, and he developed polio in California, as well. Thus, New York's choice of law rules, which apply to this action by virtue of the holding in *Klaxon Co. v. Stentor Elec. Mfg.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941), dictate that California substantive law applies because that is the place where plaintiff's injury occurred. *Fort Howard Paper Co. v. William D. Witter, Inc.,* 787 F.2d 784, 795 (2d Cir. 1986); *Wright v. Carter Prod., Inc.,* 244 F.2d 53, 56-57 (2d Cir. 1957).

Issue of the Adequacy of the Warnings

It is undisputed that polio vaccines are inherently dangerous drugs. The seller of such a product may be required to give directions or warning as to use on the product's container. Restatement (Second) of Torts, § 402A comment j (1965).[4] Once

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4. Restatement (Second) of Torts, § 402A comment j, states:

> In order to prevent the product from being unreasonably

(Cont'd)

the warning is given, there is a presumption that it will be read and heeded. *Id.* Comment k to § 402A of the Restatement (Second) of Torts acknowledges that vaccines may sometimes cause damaging consequences when injected, but that the diseases they are designed to combat also are terrible. The comment provides:

(Cont'd)

> dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.
>
> But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.
>
> Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

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> [B]oth the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Thus, drug manufacturers are obligated by law to provide doctors and/or consumers with adequate knowledge of the hazards of the drugs they manufacture. If they do so, they are held not to a strict liability standard for the consequences attending the use of the product, but to a negligence standard. *Brown v. Superior Court,* 182 Cal.App.3d 1125, 227 Cal.Rptr. 768 (1 Dist.), *petition for review granted,* 229 Cal.Rptr. 663, 723 P.2d 1248 (1986). In

a negligence action, the adequacy of warnings is determined based on their "reasonableness." *Finn v. G.D. Searle & Co.*, 35 Cal.3d 691, 700, 200 Cal.Rptr. 870, 875, 677 P.2d 1147, 1152 (1984). If the drug is given under clinic-type conditions the manufacturer is obliged to warn consumers directly. In the case of prescription drugs dispensed by physicians, the obligation is to warn the physician. This "prescription drug rule" has been followed by the courts of California. *See Fogo v. Cutter Laboratories, Inc.*, 68 Cal.App.3d 744, 754, 137 Cal.Rptr. 417, 423 (1 Dist.1977); *Magee v. Wyeth Laboratories, Inc.*, 214 Cal.App.2d 340, 348, 29 Cal.Rptr. 322, 328 (2 Dist.1963). The rule was explained in *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096, 95 S.Ct. 687, 42 L.Ed.2d 688 (1974), as follows:

> Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative. Pharmaceutical companies then, who must warn ultimate purchasers of dangers inherent in patent drugs sold over the counter, in selling prescription drugs are required to warn only the prescribing physician, who acts as a "learned intermediary" between manufacturer and consumer.

498 F.2d at 1276.

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The parties do not seriously dispute that in the present case we are considering Lederle's duty to direct warnings to the prescribing physician and the medical profession in general, rather than to the patient. The parties' primary dispute is over the type of warnings required to be given to meet the manufacturer's duty under California law.

The second jury agreed with Plummer's claims that the warnings issued by Lederle regarding Orimune improperly (i) minimized the risk of contact polio and (ii) failed to specify precautions that could be taken to avoid these risks. On this appeal, we must determine whether the district court properly construed California law applicable to this action as allowing Lederle to be found liable to Plummer if inadequacies of this nature were present in Lederle's warnings. Lederle contends that such inadequacies are, as a matter of law, insufficient to support the jury's verdict.

With regard to the issue of alleged minimization of the risk in product warnings, the California authority most closely analogous to the instant case is *Kearl v. Lederle Laboratories,* 172 Cal.App.3d 812, 218 Cal.Rptr. 453 (1 Dist.1985). The facts underlying *Kearl* differ in only two ways from those in the present case: (i) contact polio was not involved (i.e., the vaccinee herself contracted the disease from the administration of Orimune); and (ii) the vaccine was administered in a clinic-type setting so the court was required to review manufacturer warnings transmitted directly to the patient, rather than through a "learned intermediary" such as a doctor. The claims regarding the adequacy of the warnings in *Kearl* are almost identical to those asserted by Plummer in the present case. The *Kearl* court noted that Lederle had warned the patient directly of the risk of contracting polio from the vaccine, and mentioned the alternative vaccine, IPV.

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The court concluded that this warning adequately informed plaintiff of the foreseeable risks. It rejected plaintiff's contention that the warning was inadequate for failing to state precisely the exact known risks of contracting polio from OPV relative to contracting it from wild polio viruses (i.e., without being vaccinated). The court concluded: "whatever duty a manufacturer may have to inform of risks associated with nonuse of a product, such a duty most certainly cannot be imposed when the relationship between use and nonuse is statistically close (and quite possibly immeasurable) and the probability of injury from either course is extremely remote." 172 Cal.App.3d at 835, 218 Cal.Rptr. at 468. The court held the warning to be adequate as a matter of law.

In the present case, we similarly hold that the warning was adequate as a matter of law. The first jury found that Lederle took reasonable efforts to disseminate the 1979 package insert to the medical profession. The 1979 insert contained statistics compiled by public health authorities estimating the number of cases of contact polio per doses of vaccine distributed. This method of stating the risk of contact polio is used not only by Lederle, but also by established medical authorities. Even assuming, as the second jury found, that the warnings did minimize the risk of contracting contact polio, the fact remains that the probability of contracting either contact polio or wild polio is extremely remote. The *Kearl* decision thus establishes that the verdict here cannot be supported by Plummer's theory that Lederle negligently minimized the risks of contracting contact polio in its package inserts.

Plummer further claims that the California Supreme Court has endorsed an approach that requires manufacturers of prescription drugs to give warnings of specific precautions that can be taken to avoid the hazards of its drug, citing *Finn, supra*,.

This contention is not supportable. *Finn* merely recognized in dictum that two types of warnings exist: those which instruct the consumer regarding use of a product and those which inform him regarding risks that may follow from use of a product. 35 Cal.3d at 699, 200 Cal.Rptr. at 875, 677 P.2d at 1152. Nowhere did the court state that a prescription drug manufacturer would be deemed negligent for failing to specify precautions in its package inserts. The California courts have not yet addressed the question of whether precautions must be specified as a matter of law in prescription drug cases.

However, Lederle correctly points out that in *Dunn v. Lederle Laboratories,* 121 Mich.App. 73, 328 N.W.2d 576 (1982), a Michigan appellate court was presented with this same proposed theory of liability in a contact polio case and was asked to reverse judgment in favor of Lederle. The court refused to find a duty to warn of precautions to be taken in connection with prescribing Orimune. That court stated: "[c]onsidering the slight risk of contact polio, the variability of risks of harm (depending on many personal factors, including cleanliness and frequency and type of contact with a recently-vaccinated child), the introduction of individualized medical judgment, and . . . other policy reasons . . ., we do not accept plaintiffs' invitation to add new requirements to a manufacturer's duty to warn." 121 Mich.App. at 83, 328 N.W.2d at 581 (footnotes omitted).

In the present case, the judgment of the district court rests on the jury's finding that Lederle's warnings were legally inadequate because they failed to specify precautions for avoiding contact polio. We must determine what the California Supreme Court would decide if it were faced with this question. In the absence of any applicable California precedent in the prescription drug context based on a duty to specify precautions, we believe

the California Supreme Court would not expand a manufacturer's duty and require that specified precautions be stated, especially where the warnings are being directed to a "learned intermediary" such as a doctor. In short, judgment notwithstanding the verdict should have been directed since there is no duty under California law to specify precautions in the prescription drug context.

The Proximate Causation Issue

The second major issue on appeal relates to the proof of proximate cause. Lederle claims that Plummer failed to make a showing sufficient to establish all the elements essential to his case, thus the motion for judgment notwithstanding the verdict should have been granted. *See Celotex Corp. v. Catrett,* ___U.S.___, 106 S.Ct.2548, 2554, 91 L.Ed.2d 265 (1986). In particular, Lederle claims Plummer did not prove that inadequacy of the warnings was the proximate cause of his injury, since the testimony established that Dr. Cohen was aware of the risks of contact polio but as a matter of practice, did not convey these warnings to the parents of the patient. Lederle claims that the verdict must be set aside because of this failure of proof of proximate causation.

Plummer responds by arguing that the jury was entitled to discredit Dr. Cohen's testimony and reach its own conclusion on proximate cause. Presumably, Plummer contends that the jury's conclusion in response to the question on minimization of the risk, i.e., that Dr. Cohen was prompted not to warn the patients based on the inadequacies in the warnings to state the true risk, is the substitute for a finding on proximate cause. In support, plaintiff cites *Stevens v. Parke, Davis & Co.,* 9 Cal.3d 51, 107 Cal.Rptr. 45, 507 P.2d 653 (1973), a case which imposed liability on a drug manufacturer because its overpromotion of a dangerous

drug to the medical profession was coupled with a gross minimization of the risk of prescribing the drug in the product warnings.

Stevens is distinguishable because in the present case there is no evidence that Lederle overpromoted Orimune, nor is there proof that Lederle grossly minimized the risk. At best, Lederele understated a small risk to make it appear even smaller. Furthermore, as Lederle notes, the plaintiff failed to prove that a proper warning would have altered the doctor's conduct.[5] Dr. Cohen testified that he knew of the information plaintiff claimed should have been in the insert—that an unimmunized person should avoid contact with the vaccinee for 30 days— but still did not warn Plummer's daughter. As the California intermediate appellate court has stated, "no harm could have been caused by failure to warn of a risk already known." *Rosburg v. Minnesota Mining & Mfg. Co.*, 181 Cal.App.3d 726, 730, 226 Cal.Rptr. 299, 305 (1 Dist.1986).

According to Plummer, Dr. Cohen's testimony that he had a practice of failing to warn his patients of the risk of contact polio should not be credited because he was an interested witness. It may be true that Dr. Cohen was an interested witness, but his was the only testimony on the issue of proximate cause. Even if the jury failed to credit him, Plummer has not proven an essential element of his case. Furthermore, even if the warnings had been stronger, a reasonable jury could not have concluded that Dr. Cohen would have warned the vaccinee's mother. Thus, judgment notwithstanding the verdict should be entered for Lederle because a reasonable jury could not have found proximate cause.

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5. There is no claim or evidence that defendant had knowledge of Dr. Cohen's practice not to warn, or of such practice by other physicians.

See Dunn, 121 Mich.App. at 85, 328 N.W.2d at 582; *Stanback v. Parke, Davis & Co.*, 657 F.2d 642, 646 (4th Cir.1981) (doctor testified he knew of risk but had practice of not informing patients about it); *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87, 92 (2d Cir. 1980) ("no one needs notice of that which he already knows").

CONCLUSION

On Lederle's appeal, we vacate the judgment of the district court and remand for entry of judgment notwithstanding the verdict. Thus, it is not necessary to address Lederle's claims that various evidentiary rulings and instructions to the jury were erroneous, and that the second jury's answers to certain questions were inconsistent.

In view of our decision that judgment notwithstanding the verdict should be granted, Plummer's cross-appeal is denied in all respects.

APPENDIX C—MANDATE OF THE SECOND CIRCUIT GRANTING LEDERLE'S APPEAL GRANTING LEDERLE JUDGMENT N.O.V. AND DISMISSING THE COMPLAINT, DENYING PLAINTIFF'S CROSS APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

86-7768
86-7798

FILED MAY 19 1987

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of May one thousand nine hundred and eighty-seven.

Present:

HON. GEORGE C. PRATT,
HON. ROGER J. MINER, Circuit Judges.
HON. CHARLES H. TENNEY, District Judge.*

HARRY PLUMMER,

Plaintiff-Appellee, Cross-Appellant,

-v.-

LEDERLE LABORATORIES, Division of AMERICAN CYANAMID COMPANY,

Defendant-Appellant, Cross-Appellee

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* The Honorable Charles H. Tenney, senior District Court Judge of the United States District Court for the Southern District of New York, sitting by designation.

Appendix C

Appeal from the United States District Court for the District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment in the Lederle appeal from said District Court be and it hereby is vacated and remanded to the said District Court for entry of judgment not withstanding the verdict in accordance with the opinion of this court.

Further ordered that the Plummer cross-appeal is denied in all respects pursuant to the opinion of this court.

s/ Elaine B. Goldsmith
Clerk

s/ Edward J. Guardaro
By: Edward J. Guardaro
Deputy Clerk

THIS DOCKET WAS ENTERED ON THE DOCKET ON 7-17-87

APPENDIX D—JUDGMENT DATED AUGUST 11, 1986 IN FAVOR OF THE PLAINTIFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 CIVIL 2037 JES

FILED AUG 11 1986

HARRY PLUMMER

Plaintiff

-against-

LEDERLE LABORATORIES, Division of AMERICAN CYANAMID COMPANY,

Defendant.

A jury trial before the Honorable John E. Sprizzo, U.S.D.J., having begun on October 1, 1984, and at the conclusion of the trial the jury having answered the attached interrogatories, and the jury in so doing having returned a verdict in favor of the plaintiff in the sum of $3,200,000.00, and the Court having reserved decision on defendant's motion to set aside the verdict and the Court having set aside the verdict and ordered a new trial as to the issues of proximate cause, a second jury trial having begun on June 2, 1986, as to the issue of proximate cause only and at the conclusion of the trial the jury having answered the attached questions, and the jury in so doing having returned a verdict in favor of the plaintiff; and the Court having reserved decision, pending briefing on defendant's motion to set aside the verdict; and the Court thereafter on July 28, 1986, having handed

down its order denying defendant's motion for a new trial, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment as against the defendant in the sum of $3,200,000.00.

s/ Raymond F. Burghardt
Clerk

DATED: NEW YORK, N.Y.
August 11, 1986

APPROVED:

s/ John E. Sprizzo
U.S.D.J.

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 8-13-86.

APPENDIX E—ORDER OF THE DISTRICT COURT, HONORABLE JOHN E. SPRIZZO, DATED JULY 24, 1986, REFUSING TO SET ASIDE THE JURY'S SECOND VERDICT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2037 (JES)

Harry Plummer,

Plaintiff,

-against

Lederle Laboratories, etc.,

Defendant.

The above-captioned action having come before the Court, and counsel for defendant having filed a memorandum of law in support of defendant's oral application for a new trial, and the Court having considered all issues raised in defendant's memorandum and in plaintiff's responding memorandum, and all issues raised with respect to defendant's motion for a new trial, and the Court having determined that the second jury's answers to Questions 6 and 7 are not irreconcilably inconsistent answers to redundant questions, *compare Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660, 662-63 (2d Cir. 1975) *with Brunner v. Maritime Overseas Corp.*, 779 F.2d 296, 299 (5th Cir. 1986); *Julien J. Studley, Inc. v. Gulf Oil Corp.*, 407 F.2d 521, 526-27 (2d Cir. 1969), but, rather, distinct answers to separate questions based upon separate and distinct theories of liability and causation as advanced by plaintiff at the trials of this action, and the Court having concluded that the answers to Questions 6 and 7 can and

should be reconciled, *see, e.g., Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963), and, indeed that all of the jury's answers to all of the questions can be so reconciled and that the jury's findings support the judgment against the defendant, it is

ORDERED that defendant's motion for a new trial be, and hereby is denied.

Dated: New York, New York
July 24, 1986

s/John E. Sprizzo
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ 2037 (JES)
Case Number

JUDGE JOHN E. SPRIZZO

HARRY PLUMMER

-v-

LEDERLE LABORATORIES, Division of AMERICAN CYANAMID COMPANY

(FULL TITLE OF CASE - IF NECESSARY USE OTHER SIDE)

APPEARANCES: (include firm name and telephone #)

FOR PLAINTIFF:

Edward Sanocki, Jr. & Ira Newman
Julien & Schlesinger, P.C., 2 Lafayette St.,
NY, NY 212-962-8020

FOR DEFENDANT:

J. Peter Coll & Charles Gerdts III
Donovan Liesure Newton & Irvine,
30 Rockefeller Plaza, NY, NY 212-307-41

TRIAL (JURY) BEGUN: (retrial of proximate cause issue) 6/2/86 continued: 6/3/86, 6/4/86, and concluded 6/5/86.

Appendix E

Jury verdict for Plaintiff on Special Interrogatory questions 1-6.

Jury verdict for Defendant on Special Interrogatory question 7.

Decision reserved pending briefing on Defendant motion to set aside verdict.

(AN EXTRACT OF THE MINUTES)

CLERK HOWARD VIGORITA

COURT REPORTER William Cohen

Appendix E

QUESTIONS FOR THE JURY

1. Do you find that plaintiff has established by a fair preponderance of the evidence that the manner in which the defendant described the risk of vaccine associated contact polio in the package insert minimized that risk?

Yes x No

2. If you answered the above question yes, did that description influence Dr. Cohen to not give any warnings?

Yes x No

3. Do you find that plaintiff has established by a fair preponderance of the evidence that the defendant's failure to advise a reasonably prudent private physician in its 1977 insert that a program of IPV inoculation for unimmunized adults should be considered was a legal cause of the plaintiff's injury?

Yes x No

4. Do you find that plaintiff has established by a fair preponderance of the evidence that the defendant's failure in its 1977 insert to advise a reasonably prudent private physician that unimmunized adults should not come in contact with an infant recently vaccinated with oral polio vaccine for approximately one month was a legal cause of plaintiff's injury?

Yes x No.

5. Do you find that plaintiff has established by a fair preponderance of the evidence that the defendant's failure in its

Appendix E

1977 insert to advise a reasonably prudent private physician of the necessary precautions to be taken to avoid contact with an individual immunized with oral polio vaccine was a legal cause of plaintiff's injury?

Yes x No.

6. Do you find that the plaintiff has established by a fair preponderance of the evidence that the defendant's failure in its 1979 insert to advise a reasonably prudent private physician that unimmunized adults should not come in contact with an infant recently vaccinated with oral polio vaccine for approximately one month was a legal cause of plaintiff's injury?

Yes x No

7. Do you find that plaintiff has established by a fair preponderance of the evidence that the defendant's failure in its 1979 insert to advise a reasonably prudent private physician of the necessary precautions to be taken to avoid contact with any individual immunized with oral polio vaccine was a legal cause of plaintiff's injury?

Yes No. x

APPENDIX F—ORDER DATED SEPTEMBER 2, 1986 DENYING THE PLAINTIFF'S MOTION TO AMEND THE JUDGMENT FOR INTEREST RUNNING FROM AN EARLIER DATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2037 (JES)

FILED SEP 5 1986

Harry Plummer,

Plaintiff,

-against-

Lederle Laboratories, etc.,

Defendant.

ORDER

The above-captioned action having come before the Court and plaintiff having requested, by letter dated August 21, 1986, "that the Court direct the clerk to enter judgment providing for interest from October 12, 1984," and the Court having considered all issues with respect to that request,

ORDERED that plaintiff's request that the Court amend the Judgment previously entered in the above-captioned case on August 11, 1986 to provide for interest from October 12, 1984 be, and hereby is denied.

Appendix F

s/ John E. Sprizzo
United States District Judge

Dated: New York, New York
September 2, 1986

APPENDIX G—TRANSCRIPT OF COURT'S DECISION DATED FEBRUARY 21, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2037

HARRY PLUMMER,

Plaintiff,

-against-

LEDERLE LABORATORIES, Division of AMERICAN CYANAMID COMPANY,

Defendants.

New York, N.Y.
February 21, 1986
4:30 p.m.

Before:

HON. JOHN E. SPRIZZO,

District Judge

APPEARANCES:

JULIEN & SCHLESINGER
Attorneys for Plaintiff
BY: DAVID JAROSLAWICZ
EDWARD J. SANOCKI

Appendix G

DONOVAN, LEISURE, NEWTON & IRVINE
Attorneys for Defendants
BY: J. PETER COLL, JR.
CHARLES W. GERDTS

THE COURT: Good afternoon. I read your papers. I called you in because I am going to rule on your motions and I figured I might as well do it now rather than have you wait until I write an opinion, since this case has already been delayed a while because there was some mixup with the filing of plaintiff's papers and we didn't get them.

I have considered all the applications, and the Court rules as follows:

First of all, the motion for a new trial based upon insufficiency is denied. I have reviewed the cases, checked the case authorities, and I am convinced the evidence is sufficient. So I adhere to what I indicated to you earlier.

With respect to the charge, the argument that the Court should have charged as to substantial factor in causation I don't think is supported by the California Pattern Jury Instructions nor by anything I see in the law of California, except some language in appellate opinions which has never been translated into the jury instructions. So I am not persuaded that the law of California requires that charge. What's more, I think the plaintiff is quite correct in stating that that particular charge was never requested. I looked at your requests to charge and it isn't there. So I would not be inclined to grant a new trial for that reason.

However, upon reviewing the charge, I think there was an

error in the charge which requires a new trial on the causation issue. When I gave my supplemental instructions to the jury—and this is not an argument that was precisely made, but when I read the charge again, upon reflection I think there is an error there—I told the jury that the only basis upon which the defendant could be exonerated is if the doctor was the sole cause of the injury. That may have had the effect of taking away from the earlier portion of my charge which correctly pointed out to the jury the theory as to the plaintiff's not following the doctor's advice. There were two theories upon which the defendant could have been exonerated, as I put the case to the jury in my main charge. One was that the doctor was the sole cause, in the sense that he, by an independent act of his own, decided not to give the advice; the other one was that, even assuning that the doctor had given that advice, the plaintiif would not have followed it. Those were two possible theories upon which the defendant could have been exonerated. The Court's charge in its supplemental instructions took away the second possibility, which had been pointed out earlier in the charge.

That argument was not made precisely in that form in the motions. But upon reviewing the charge, I think it was error to tell the jury that the sole predicate upon which the defendant could be exonerated is that the doctor was the sole cause of the injury. I am still convinced, as I was before, that there is a factual issue in the case as to whether the doctor's conduct was impacted by misinformation which the defendant may have circulated in the community. I think that raises a jury question.

Therefore, I think the case has to be retried before a jury. I am not inclined to grant judgment for the defendant, but I think, since my charge left open the possibility that the jury would think that the only basis upon which they could exonerate the defendant

was that the doctor was the sole cause of the injury, it eliminated the possibility that the plaintiff might be a cause. The plaintiff's conduct being the sole cause was an issue which was testified about and was argued and is in the record, and I think my earlier charge correctly put that to the jury. But that supplemental instruction, coming as it did when the jury specifically requested a charge on causation—ordinarily, you could take the position that the charge as a whole put that issue fairly to the jury—in fairness, requires a new trial of that issue only.

I am satisfied that the evidence is sufficient, and I am satisfied that the damage award is adequate. I don't know that that was even raised on the motion.

MR. COLL: It was not.

THE COURT: But I think we have to have a new trial on the causation question, which is one question for the jury. I think on all other aspects the trial was correct. It will give you time before the next trial on the causation question, Mr. Coll, to give me some cases arguing the proposition that the California law requires a substantial factor instruction.

MR. COLL: I understand.

THE COURT: It is not present in the California jury instructions, as they correctly point out.

MR. JAROSLAWICZ: Your Honor, if I can be heard—I don't think I can change your Honor's mind—

THE COURT: You can be heard if you want to, but I considered it very carefully, I read the charge, and I think it is erroneous.

Appendix G

MR. JAROSLAWICZ: I don't think there was any objection made in time so that your Honor could have cured it without putting the plaintiff—

THE COURT: But there was an objection made, there was an objection specifically taken to my supplemental instruction. It was there.

MR. JAROSLAWICZ: Number two, your Honor—

THE COURT: I read the record on it.

MR. JAROSLAWICZ: The jury could have made a finding of contributory negligence or comparative negligence on the part of the plaintiff. Their finding that there was no comparative negligence takes that issue your Honor has raised right out of the case. They might have found that the doctor was negligent, the plaintiff was 25 percent comparative negligent, in which case your Honor would have reduced the verdict.

THE COURT: Did we ask the question as to whether the plaintiff was contributorily negligent?

MR. JAROSLAWICZ: That was in your Honor's charge.

THE COURT: Was it in a specific question to the jury? If I had an answer to a specific question that the plaintiff was not at all negligent, that would perhaps indicate to me that, even though my charge was erroneous, it had no impact upon the jury.

MR. COLL: I don't believe we argued, your Honor, the plaintiff's contributory negligence here, because this wasn't a case where the plaintiff had made some sort of conscious decision or

that we could argue that there was any evidence from which the plaintiff—

THE COURT: Do you have the questions there?

MR. COLL: I do. I am pulling them out. But I don't believe that there was.

MR. JAROSLAWICZ: Your Honor, there was no argument that the plaintiff was contributorily negligent, and the issue your Honor has raised does not require a new trial.

THE COURT: No, but if you go back earlier in my charge, I did tell the jury that you would have to find that the plaintiff was to follow the instructions of the doctor. I think I did tell them that, and I think the plaintiff testified to that.

MR. JAROSLAWICZ: That's correct.

MR. COLL: There is no such question, your Honor. I have the questions right here.

MR. JAROSLAWICZ: Your Honor is now setting aside the verdict on an issue that was never raised to this jury because it just wasn't an issue.

THE COURT: The plaintiff testified about it and I put it to the jury the first time around. Do you have my instructions the first time around?

MR. JAROSLAWICZ: That was part of the standard instructions. But the defendant never requested a charge or question on comparative negligence, because it just wasn't in this case.

Appendix G

THE COURT: No, but the charge was plainly incorrect in telling the jury that the only basis upon which they could exonerate the defendant is that the doctor's negligence was the sole cause of the accident. I am still inclined to think that is the theory upon which they have to recover before we even get to the plaintiff's negligence. But the jury could have found that the doctor's negligence in not warning was a cause, or they could have found the plaintiff would not have followed the doctor's instructions.

MR. JAROSLAWICZ: Your Honor, if they found the doctor's negligence in not warning was "a" cause—it does not have to be "the" cause—if it is "a" cause, at most you can reduce it by the amount that the plaintiff might have been negligent.

THE COURT: I understand that, but the charge told the jury that the only basis upon which the defendant could be exonerated is if the doctor's negligence was the sole cause of the accident. I think that is error.

MR. JAROSLAWICZ: It is error to the plaintiff. The defendant got a more favorable charge than they were entitled to. They were told that the doctor had to be the sole cause instead of simply being a cause. That charge was more favorable to the defendant than they were entitled to.

THE COURT: Just let me look at the earlier portion of the charge.

I said here, starting at page 695, and I will read it to you:

"In that regard the defendant's contention, as I have told you"—and I think this portion of the charge is correct—"is that even if you find the defendant's conduct to be negligent or that

they are liable to the plaintiff on the theory of strict liability because the product is defective—and I have drawn that distinction for you, that is, if you find that the defendant's conduct was improper either on the theory of strict liability or on the theory of negligence in that they didn't give an adequate warning to the medical profession at large, in which case you must reach the question of causation—then the defendant's argument here is that they are not responsible for the plaintiff's injury because there was a separate and independent intervening cause which broke the chain of causation.

"That is what Mr. Coll referred to in his summation. He said that Dr. Cohen knew everything there was to know, everything the defendant could have told him in any kind of warning, he made his own judgment not to tell the patient, and but for his conduct in not disclosing the risk and his conduct in not taking the precautions, Plummer would not have suffered his injury.

"In short, the defendant claims that Dr. Cohen's conduct was the sole cause of the plaintiff's injury and that therefore, even if you find the conduct of the defendant to be improper and negligent in any regard, the defendant should not be held liable, because Dr. Cohen is a separate and independent intervening cause. That is for you to decide.

"The plaintiff argues, on the other hand, this is not so, that the warning was inadequate. The plaintiff claims that the defendant contributed to whatever misinformation Dr. Cohen may or may not have had about the danger of this vaccine, not only because of the inadequacy of the defendant's insert but because they had other advertisements out in the public at large that tended to contribute to a misunderstanding or which tended to underestimate the risk, and therefore the defendant contributed to Dr. Cohen's

misunderstanding of the risks involved and the defendant bears some responsibility for what happened, even if we assume that Dr. Cohen was also a cause.

"In short, as Mr. Sanocki argued to you on the summation, the plaintiff's argument is that even if the doctor is in part responsible, the defendant is also in part responsible.

But for purposes of the defendant's defense based upon causation, if you find that the conduct of the doctor, Dr. Cohen, was the sole cause of the plaintiff's injury and that but for his conduct the injury would not have occurred, notwithstanding the adequacy or inadequacy of the warnings, then you should find for the defendant on that issue.

"The defendant has not argued this specifically, but of course you must find as credible the testimony you have heard from the plaintiff's witnesses that if the parents of the child had been told, they would have refrained from contact or abided by whatever instructions the doctor gave them in that regard with respect to other persons. That is also part of it. That testimony has not been contradicted. But that is also something you must find. Obviously, if the doctor had instructed them and if they wouldn't have listened to him anyway, then the chain of causation would also have been broken. I don't think there has been any testimony as to that."

What I am saying to you is that I put to the jury correctly the first time that the chain of causation could have been broken either by the doctor's conduct or by the plaintiff's conduct. In giving my supplemental instruction, I told the jury that the only basis upon which they could exonerate the defendant was if the doctor's conduct was the sole cause.

I think that is error, and I think if you go to the Court of Appeals on it, it will surely be reversed and you will have wasted the time and effort of an appeal, so we might just as well correct it now.

MR. JAROSLAWICZ: Your Honor, I don't think it is error, because the jury—

THE COURT: It is nice for you to tell me so, but I think it is error and it is my charge. I think if one makes a mistake, the whole purpose of a new trial is to correct it before going to the Court of Appeals. It is a lot more wasteful in terms of time and expense to have the case go up there when all that has to be tried, in perhaps two days or so, is an issue of causation. Everything else has been resolved.

MR. JAROSLAWICZ: What issue of causation are we going to retry, Judge?

THE COURT: Whether the defendant's conduct caused the plaintiff's injury. The adequacy of the warning has already been ruled upon and that stands. The damages stand. All we have to try is the issue of causation. That is a two-day trial.

MR. JAROSLAWICZ: But, your Honor, with respect to the comparative causation of the plaintiff or the comparative negligence of the plaintiff, the jury might find the plaintiff 100 percent comparative, in which case he is out. That is really what we are talking about.

THE COURT: But the charge was wrong. The charge told the jury that the only basis upon which they could exonerate the defendant was if the doctor was the sole cause of the injury. There

was another basis: If the plaintiff's conduct was the sole cause of the injury. That is error. You can't get around that, Mr. Jaroslawicz.

MR. JAROSLAWICZ: Number one, I think it is something that is dredged up. Number two, your Honor—

THE COURT: It wasn't dredged up by them; it was dredged up by me. I read my charge and it is wrong.

MR. JAROSLAWICZ: It was never raised at the time that jury was sitting there so your Honor could say, "Excuse me, there is a second ground. If you find the plaintiff wouldn't have done it anyhow, then you can find for the defendant." But to wait until after the trial, not to ask your Honor to charge that, and now to come back and seek a new trial after the jury is gone is unfair.

THE COURT: If it were a matter of only the issues they raised specifically, I would have denied their motion, because I am not convinced that the California law requires a charge on substantial causation and they did not request one. I agree with you. But I think my charge was plain error.

MR. JAROSLAWICZ: But where did they object to it in time to cure it?

THE COURT: First of all, they did object to the supplemental instructions, although not on that ground. Second of all, even if they had not objected to the supplemental instructions, I think it is plain error.

MR. JAROSLAWICZ: I don't think this jury was misled

for one second. If this jury would have agreed that the plaintiff had not followed the doctor's instructions, they would have come back with a defendant's verdict. And they didn't even argue it, because that wasn't an issue in the case. They presented no evidence of that issue. If this jury had come back, your Honor, and found—and I say this to you very seriously—that the plaintiff would not have followed the doctor's instructions, I think your Honor would have had to set it aside, because there was no evidence in this record to support that type of claim.

THE COURT: The jury could have disbelieved your client's testimony. Your client is an interested witness. The jury doesn't have to believe that merely because it was uncontradicted.

MR. JAROSLAWICZ: We agree on that.

THE COURT: I put that question to the jury. Nobody objected to my putting that question to the jury. I read it to you. I had forgotten how clearly I put that question to the jury, but when I read my supplemental instruction, it was wrong. It is unfortunate, but I did make a mistake, and that is what motions for a new trial are for.

MR. JAROSLAWICZ: What issue are we going to retry, Judge?

THE COURT: Just the issue of causation. The issue I just described has to be put to the jury as to whether the doctor's conduct was the sole cause or whether the plaintiff would have followed the doctor's instructions. Normally, Mr. Jaroslawicz, I would take the position that, having correctly put the issue to the jury the first time around, if I made a mistake the second time around, the charge has to be taken as a whole and I might

let the Court of Appeals rule upon that. But coming as it did, when the jury specifically asked for the charge on causation, and I charged on causation something which was plainly wrong, it seems to me I can't take the position that it is harmless error. And neither will the Court of Appeals. So you would be just wasting your time taking an appeal anyhow.

MR. JAROSLAWICZ: The issue we are going to retry, just so I am clear, Judge, is that if the doctor had warned the plaintiff, would the plaintiff have followed his instructions?

THE COURT: No. The issue I am going to try again is whether the defendant's conduct was the cause of the injury.

MR. JAROSLAWICZ: Was a cause.

THE COURT: A cause, the cause, substantial cause—whatever you can persuade me the charge should be the next time around.

MR. JAROSLAWICZ: Then we will be retrying the entire case, Judge.

THE COURT: No, we won't. The last time we tried the adequacy of the warning.

MR. JAROSLAWICZ: The warning has already been found to be inadequate.

THE COURT: That is what I am saying. That stands.

MR. JAROSLAWICZ: The only question remaining, then, is: Does the jury find that with an adequate warning the doctor would have done otherwise?

THE COURT: Well, that is part of the causation question.

MR. JAROSLAWICZ: And (b) would the plaintiff have followed the doctor's instructions had he been given proper instructions?

THE COURT: That is basically it.

MR. COLL: We have a specific finding, your Honor, as to the inadequacy in this case.

THE COURT: That stands.

MR. COLL: I understand that. That is, there was no warning in the insert that advised the doctor to tell the parent or somebody who would come into contact to stay away from the child for approximately a month. That is the specific finding of inadequacy in this case. And the case we are going to try or what remains to be tried to the jury would be: With that inadequacy, would the doctor have done something different here?

THE COURT: We are going the try the question of causation again under the proper instructions. I will give you a chance to persuade me the next time around that I should charge on substantial cause. I don't think the law requires that, and if I had to set aside the verdict on that basis, I would let it go to the Court of Appeals, because I am convinced in my own mind that at least that would be an arguable issue up there. But I think when I told the jury the only basis upon which the defendant could be exonerated, it just detracted from the effect of my earlier instructions. I admit there was no real issue of that and you didn't argue that, but I put it to the jury anyway, and I think I should have put it to the jury anyway. I was surprised when I went back

and read the charge that I had, because I hadn't remembered doing that. It is just an off-the-cuff supplemental instruction which I should not have given that creates the problem. On the basis of the first charge, the issue of causation would have been fairly presented to the jury and resolved against the defendant; but I think, coming as it did in the supplemental instructions, I can't take the view that it is harmless error. I think it may very well be plain error. So we are just wasting our time, I think, if we don't correct it now. No one likes to retry cases less than I do, as you know.

MR. JAROSLAWICZ: I know one person who does.

THE COURT: Less than I am? Who is that, Judge Milton Pollack?

MR. JAROSLAWICZ: No, that is us.

THE COURT: I know, but you have to be practical about it and realize that you are probably better off trying the issue now than having to take an appeal, spending all that money, and being back here a year from now.

MR. JAROSLAWICZ: Judge, quite frankly I think the Court of Appeals has an expedited appeal on a case like this, it will take three months, and then if they send us back on that issue, we will try it then. I personally don't think they will send us back. It was never argued; it wasn't an issue in the case. Your Honor did present it to the jury sua sponte. They never argued it. They never objected to your Honor's charge. When the jury was here, nobody objected.

THE COURT: They objected to my supplemental instructions.

MR. JAROSLAWICZ: Nobody objected on that ground. To object on a different ground is not a basis for later finding a different ground, Judge.

THE COURT: No, I think their objection was specific enough.

MR. JAROSLAWICZ: Their objection was not on the ground that your Honor should have charged that maybe the plaintiff was at fault.

THE COURT: Should I read it to you again?

MR. JAROSLAWICZ: The objection had nothing to do with the plaintiff being at fault.

THE COURT: First of all, he made his first objection in the middle of page 756 when I cut him off. It is hard to charge him with not making it. Then he says at the bottom of page 756:

"I had the objection before as to the use of the word 'sole,' and I renew the objection."

That is pretty close to what he should have said. Then I said:

"If that is your objection, I overrule it," etc.

Then he says, at page 757:

"That is where I don't agree with your Honor and that is why I think that, coming out with that additional supplemental instruction at this point, in essence focuses their attention on that rather than on the whole charge."

I think that is pretty close. Admittedly it could have been closer. But I don't think it makes much difference. I think the charge I gave was wrong. When a jury asks for a supplementak instruction and gets a bad instruction, I think it leverages the case terribly and it should be retried.

I don't know why you are so upset about it. You just have to retry one question. You have to bring Dr. Salk back, basically.

MR. JAROSLAWICZ: Well, that is not easy, quite frankly. Number two, I have the plaintiff who is wheelchair bound.

THE COURT: You don't even have to bring Dr. Salk back. His testimony can be read into the record.

MR. JAROSLAWICZ: The effect on a jury of having testimony read from a record is vividly different from having a live witness.

THE COURT: We are talking about a very short trial.

MR. JAROSLAWICZ: Can I ask your Honor when you can fit us in?

THE COURT: It all depends upon my criminal calendar. I have a case that is scheduled to be tried next week, and if there is a plea, I can try you next week. Then I have a criminal trial starting on March 3 for two to three weeks, another one on March 24, another one on April 7, another one on May 9. Maybe in June, if I don't try you next week.

MR. COLL: Might we do this, your Honor: With respect to the retrial, Mr. Jaroslawicz, Mr. Sanocki and I can sit down,

having just heard the dates you have given to your criminal cases, and maybe we could come up with some day or two.

THE COURT: It is only a couple of days.

MR. COLL: That is what I would assume. The last liability case only took us four or five days' worth of testimony and, as you suggested, it addressed essentially the accuracy of the warning and not the proximate cause issue. Maybe we can come up with a day or two that is convenient for us, or a series of them given to you, and be prepared to go on some sort of short notice with you.

THE COURT: The only point at which the testimony will overlap is that I guess we will have to have Dr. Salk testify again to the fact that the warning you gave minimized the risk. You remember the testimony about sitting in the first seat in the orchestra, second seat in the orchestra. It didn't go only to the adequecy or inadequacy of the warning but also to the causation. The reason I say it is a jury question is that you may have contributed to the general fund of knowledge which impacted the doctor's decision, and that goes to the question of causation.

MR. COLL: I understand the Court's view to be that the stated reasons by the doctor as to why he did not pass on any type of warning may have been made not on a sound basis because of this purported minimization of the risk because of the numbers, supposedly, as to which Dr. Salk testified.

THE COURT: What Dr. Salk was saying was that there were only a certain number of people who were really exposed to the risk, and giving the risk in the dosages given, when 99 percent of the people who were given dosages were not in that immediate

vicinity of risk, tended to make people out in the community think it was more safe than it was and therefore could have impacted the doctor's decision to administer the drug without telling his patients about the risk. Even though the doctor said, "I knew everything there was to be known about the drug," if among the things he knew was a minimization of the risk, then I think that is a jury question, which is why I denied your motion on sufficiency grounds. I think that the issue ought to be put to the jury in a clearer way. I really don't like to have the Court of Appeals do more work than they do, and if I am convinced I made a mistake, why should I send it up there in the hope they will disagree with me?

MR. COLL: I just wanted to have some idea of what we would be retrying so maybe Mr. Sanocki and I can agree to some expedited fashion.

THE COURT: I don't think we need the plaintiff back, because you didn't contradict his testimony the first time. Unless you are going to do it this time, there is no need to bring the plaintiff back. That coukd be a stipulated fact.

MR. JAROSLAWICZ: If the ground on which you reverse the verdict, Judge, is that the jury may have disbelieved the plaintiff, that he wouldn't have followed the doctor's instructions anyway, then if the plaintiff doesn't have to come back, what is the basis for overturning the verdict?

THE COURT: You can bring him back if you want the jury to eee his demeanor. They didn't attack it the first time, but I still think his testimony has to be believed.

MR. COLL: There is more in the chain than just the plaintiff,

the doctor, and Lederle; also in the chain was the plaintiff's daughter.

THE COURT: Right.

MR. COLL: So that what we are talking about is a passage of information through a number of links, not just one or two.

MR. SANOCKI: I don't know what he is talking about, Judge. That was all testified to in the first trial.

THE COURT: I understand it was, but if I had kept quiet and not added to my original instruction on causation, I would deny their motion and send this case to the Court of Appeals.

MR. SANOCKI: Quite frankly, I think you did a fine job. Mr. Coll keeps dreaming up arguments until finally apparently he got one that—

THE COURT: The basis of a new trial is not something that he dreamed up; it is one that I saw when I read the transcript in considering the objections made. I accept your argument that substantial factor may not be the law, they didn't ask for it, and therefore I would not set it aside on that ground. But what I told the jury was that the defendant could only be exonerated if the doctor's conduct was the sole cause of the injury. That is just plain error. It is not so. And coming as it did in the supplementel instructions, I think there has to be a new trial on that issue. I apologize to you for that, because it really wasn't anybody's fault but mine. It may very well come out the same the next time around, but it should be tried under adequate instructions. That supplemental instruction was just plain wrong.

Appendix G

Sorry to break bad news to you, Mr. Jeroslawicz, on a Friday afternoon. What is is and can't be corrected.

Do you think you will be able to try this case next week if some time opened up?

MR. JAROSLAWICZ: If we can get Dr. Salk.

MR. COLL: That would be fairly difficult for me, because I am tied up in some discovery next week where I have a deadline. But the other dates you were suggesting in March and April I could do.

THE COURT: Let's see what happens. Some of these criminal cases may end earlier. Maybe I will get lucky and have some pleas. I have been involved in criminal cases since September 9, which has backed up my civil calendar.

MR. COLL: That is what we understand. Next week would be very busy for me.

THE COURT: How about if I gave you a tentative date for June 2?

MR. COLL: That's fine.

THE COURT: All right?

MR. JAROSLAWICZ: With the possibility of expediting it, your Honor.

THE COURT: I will expedite it if my schedule opens up. I will give you a priority since this case has been hanging around a while.

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MR. COLL: As I stated, I will talk to Mr. Sanocki to see if there are some dates that he and I can set aside right now and let your Honor know it.

THE COURT: Why don't you carve out June 2 for now anyway, and if it takes two or three days, we will try it that week.

Do you want to settle an order on this? Or do you want me to get something out? I will get something out. Actually it is in the transcript. I will just have a generic order.

APPENDIX H—ORDER OF THE HONORABLE JOHN E. SPRIZZO DATED FEBRUARY 24, 1986, GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL AFTER THE FIRST JURY'S VERDICT IN FAVOR OF PLAINTIFF AND LIMITING THE ISSUES FOR THE SECOND TRIAL PURSUANT TO THE COURT'S ORAL DIRECTIONS IN THE OPINION CONTAINED IN THE TRANSCRIPT OF FEBRUARY 21, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2037 (JES)

FILED MAR 3 1986

Harry Plummer,

Plaintiff,

-against-

Lederle Laboratories, etc.,

Defendant.

ORDER

The above-captioned action having come before this Court, and defendant having filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, and the Court having considered all papers, supplemental papers, and arguments submitted by the parties, and the Court having considered all issues raised by the motion, and the Court having rendered an oral decision of the motion in open court on February 21, 1986, it is

Appendix H

ORDERED that defendant's motion for a new trial is granted, for the reasons outlined by the Court in its oral opinion of February 21, 1986; and it is further

ORDERED that said new trial shall be limited as outlined by the Court in its oral opinion; and it is further

ORDERED that all parties and counsel shall be ready for trial on or after June 2, 1986, and that thereafter counsel shall be prepared to proceed to trial upon twenty-four hours' notice by the Court; and it is further

ORDERED that a Pre-Trial Conference shall be held on June 6, 1986.

s/John E. Sprizzo
United States District Judge

Dated: New York, New York
February 24, 1986

Supreme Court, U.S.
FILED
SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARRY PLUMMER,

Petitioner,

—vs.—

LEDERLE LABORATORIES, DIVISION OF AMERICAN CYANAMID COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals violate petitioner's right to trial by jury in a products liability action in federal court on diversity of citizenship jurisdiction when the court determined that judgment notwithstanding the verdict should be entered because respondent's warnings were adequate as a matter of law and, alternatively, because petitioner failed to sustain his burden of going forward on the issue of proximate causation?

PARTIES TO THE PROCEEDINGS

Respondent Lederle Laboratories is an unincorporated division of American Cyanamid Company.*

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* Pursuant to Rule 28.1 of the Rules of this Court, American Cyanamid Company states that it is associated with CYRO Industries, a partnership owned by subsidiaries of American Cyanamid Company and Rohm GmbH.

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LEDERLE LABORATORIES, DIVISION OF AMERICAN CYANAMID COMPANY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

This brief is submitted on behalf of respondent Lederle Laboratories, Division of American Cyanamid Company, in opposition to petitioner Harry Plummer's request for a writ of certiorari to the United States Court of Appeals for the Second Circuit. The request raises no issue worthy of this Court's consideration, and, for the reasons stated below, should be denied.

STATEMENT OF THE CASE

The proceedings in the district court and the court of appeals are not completely or accurately described in the petition. Accordingly, this Court is respectfully referred to the discussion of the facts and prior proceedings included in the opinion of the Second Circuit, which is included as Appendix B to the petition.

REASONS FOR DENYING THE WRIT

Petitioner's request for review by writ of certiorari of the Second Circuit's decision should be denied because none of the requisite special and important reasons for review by this Court is presented. The Second Circuit's decision raises none of the considerations set forth in Rule 17 of the Rules of this Court but does present several additional considerations which confirm that the petition should not be granted.

1. The Petition Ignores the Presence of an Independent, Non-Federal Ground Adequate to Sustain the Second Circuit's Judgment.

This Court will not exercise its jurisdiction when a judgment rests on an independent and adequate non-federal ground. *See Jankovich v. Toll Road Commission*, 379 U.S. 487, 489 (1985) (appellate jurisdiction failed because of independent non-federal ground adequate to support the judgment); *Wilson v. Loew's Incorporated*, 355 U.S. 597 (1958) (writ dismissed as improvidently granted because judgment rested on adequate state ground). The Second Circuit's decision in this diversity action falls squarely within this rule.

The only question presented by the petition is whether the Second Circuit's decision that judgment notwithstanding the verdict should be entered because of petitioner's evidentiary failure on the issue of proximate causation somehow violated petitioner's Seventh Amendment right to a jury trial. Even if this issue were worthy of this Court's consideration, the case would not warrant review because the Second Circuit's holding on proximate cause was but one of two alternative grounds it found for reversing the district court's judgment. As the Second Circuit's decision plainly demonstrates, before reaching the proximate cause issue, the court first decided that respondent was not liable to petitioner because, under California law, respondent's warnings of the risks associated with the oral polio vaccine were adequate as a matter of law. That holding was premised not on an evidentiary review, but rather

on the Second Circuit's reading of settled California law defining a drug manufacturer's duty to warn and its view that California would decline to expand that duty in the manner urged by petitioner. "In short, judgment notwithstanding the verdict should have been directed since there is no duty under California law to specify precautions in the prescription drug context." Opinion (Appendix B to the Petition), at 23a. The petition before this Court does not mention this independent, non-federal ground for the court's decision, much less attack it as an error of such proportion as to require review by this Court.

2. The Question Presented Raises Only an Evidentiary Issue in an Individualized Products Liability Case.

Review on writ of certiorari also should be denied because the issue presented by the petition would require this Court to review factual evidence. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). A review of the record would be required because the petition creates a "constitutional" issue only by assuming that evidence in the record supported the jury's finding on proximate causation. That assumption, however, completely avoids the evidentiary controversy that was at the heart of the appeal to the Second Circuit. In effect, the petition asks this Court to act as a second court of appeals, to review the same record presented to the court of appeals, and to determine whether it agrees with the court of appeals' conclusion that petitioner failed to sustain his burden of going forward on the proximate cause issue. The presentation of this kind of evidentiary issue as one warranting review has been repeatedly criticized in this Court. *See Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 111 (1959) (Stewart, J., concurring); *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 332 (1960) (Harlan, J., dissenting); *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 447 (1959) (Frankfurter, J., dissenting). As Justice Stewart noted, "to review individualized personal injury cases, in which the sole issue is sufficiency of

the evidence, seems . . . not only to disregard the Court's proper function, but to deflect the Court's energies from the mass of important and difficult business properly here." *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. at 111. That teaching applies with equal force in this case.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: New York, New York
September 18, 1987

Respectfully submitted,

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